

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 10, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2805

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**NAGAWICKA BAY SAILING CLUB
OWNERS ASSOCIATION, INC.,**

PETITIONER-APPELLANT,

V.

**WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,**

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County:
ROGER P. MURPHY, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Nagawicka Bay Sailing Club Owners Association, Inc. (the Association) is a homeowners' association comprised of owners of individual lots in a residential community abutting Lake Nagawicka. The Association owns a parcel of real estate riparian to Lake Nagawicka. In 1990, the

Association's predecessor constructed a pier into the lake. The pier was 56 feet long and 3.5 feet wide, with two "Ts" of approximately 33 feet in width. The pier was designed to accommodate eight boats.

The Wisconsin Department of Natural Resources subsequently commenced an enforcement action to compel removal of the pier, alleging that it violated §§ 30.12, 30.13 and 30.294, STATS. A contested case hearing was held before the Division of Hearings and Appeals. At the conclusion of the hearing, the Division issued a decision which found that the pier exceeded the three-foot line of navigation contour in violation of WIS. ADM. CODE § NR 326.04(1) and ordered the Association to reduce the length of the pier so that it did not extend into open water beyond 44 feet. The decision provided that the Association could construct a pier at the location of the existing pier without a permit if it did not extend beyond 44 feet, it had no more than one "T" which did not exceed 33 feet in width, and if the slips were accessed by a boardwalk not more than 3.5 feet wide raised at least 18 inches above the mat of vegetation below, which allowed for the passage of air and indirect sunlight to the vegetation below. Because of potential adverse environmental effects, the Division enjoined the Association from constructing any piers other than as permitted by its order without first obtaining a permit from the DNR under § 30.12. In addition, it enjoined members of the Association from operating boat motors in water depths of less than 10 feet while approaching or leaving the pier.

The Association petitioned the circuit court for review under ch. 227, STATS., and has now appealed from a trial court judgment affirming the Division's decision. We affirm the trial court's judgment.

When an appeal is taken from a circuit court order affirming an administrative agency's decision under ch. 227, STATS., we review the decision of the agency, not the circuit court. *See Sterlingworth Condominium Ass'n v. DNR*, 205 Wis.2d 702, 712, 556 N.W.2d 791, 794 (Ct. App. 1996). Review of an agency's decision is confined to the record. *See id.* The reviewing court must affirm the agency's decision unless it finds a ground for setting it aside, modifying it or remanding it under § 227.57(4) through (8), STATS. *See Sterlingworth*, 205 Wis.2d at 712, 556 N.W.2d at 794.

The Association raises several issues which we will discuss seriatim. Its first argument is that it was entitled to construct its pier without interference and without obtaining a permit from the DNR because the pier did not interfere with public rights in navigable waters and thus did not violate § 30.13(1), STATS. It contends that the Division erroneously interpreted "public rights in navigable waters" under § 30.13(1)(a) as being synonymous with the "public interest" under § 30.12(2), STATS. It contends that while the public interest includes protection of natural resources and environmental concerns, public rights under § 30.13(1)(a) are limited to navigation, public uses which are incidents of navigation, and scenic beauty. It contends that environmental impacts cannot give rise to a violation of § 30.13 unless and until the impacts are of such magnitude as to materially interfere with the public's exercise of public rights in navigable waters.

The Association's attempt to distinguish between "public rights" and the "public interest" was properly rejected by the Division. As acknowledged by the Association, the term "public rights in navigable waters" under § 30.13(1)(a), STATS., derives from the public trust doctrine. The term "public interest" under § 30.12(2), STATS., derives from this same doctrine. *See Hixon v. PSC*, 32 Wis.2d 608, 618, 146 N.W.2d 577, 582 (1966). Under the public trust doctrine,

the state holds the beds of navigable waters in trust for all of its citizens. *See State v. Bleck*, 114 Wis.2d 454, 465, 338 N.W.2d 492, 497 (1983). Although it was originally designed to protect commercial navigation, it has been expanded to safeguard the public's use of navigable waters for purely recreational and nonpecuniary uses, *see id.* at 465, 338 N.W.2d at 498, including boating, fishing, swimming, hunting, skating and enjoyment of scenic beauty, *see Hixon*, 32 Wis.2d at 619, 146 N.W.2d at 582. Under the public trust doctrine, the state also has a duty to eradicate pollution and prevent further pollution in its navigable waters and to protect those waters from degradation. *See Just v. Marinette County*, 56 Wis.2d 7, 16-18, 201 N.W.2d 761, 768 (1972).

In applying the public trust doctrine to navigable waters, the courts have used the terms “public interest” and “public right” without distinction. *See, e.g., Muench v. PSC*, 261 Wis. 492, 507, 53 N.W.2d 514, 520 (1952). Moreover, while not directly presented with the argument raised here, this court has held that both §§ 30.12 and 30.13, STATS., prohibit structures that are “detrimental to the public interest,” thus clearly indicating that “public rights” under § 30.13(1)(a) is the same as the “public interest” under § 30.12(2). *See Sterlingworth*, 205 Wis.2d at 716, 556 N.W.2d at 796.

Because they are the same, any riparian pier which is detrimental to the public interest interferes with public rights under § 30.13(1)(a), STATS., and requires a permit under § 30.12, STATS. *See Sterlingworth*, 205 Wis.2d at 716-17,

556 N.W.2d at 796.¹ In addition, the DNR has the authority to place conditions on a pier permit as long as those conditions further relevant policy factors. *See id.* at 717, 556 N.W.2d at 796. Preventing environmental damage is one of those factors and includes ameliorating direct impacts on water quality and sediment quality, as well as direct and indirect influences on flora and fauna. *See id.* at 713, 556 N.W.2d at 794-95.

The Association also challenges the Division's determination that it must reduce the length of its pier, contending that the line of navigation contour is irrelevant to a § 30.13, STATS., analysis and that, even if it is relevant, the record does not support the Division's finding that the pier as constructed exceeded the line. We reject both portions of this argument.

An administrative agency may promulgate rules interpreting the provisions of any statute enforced or administered by it if the agency considers it necessary to effectuate the purposes of the statute, provided the rule does not exceed the bounds of correct interpretation. *See* § 227.11(2)(a), STATS. Pursuant to § 227.11 and for the express purpose of providing consistency in the application of §§ 30.12 and 30.13, STATS., to the construction of piers, the DNR promulgated WIS. ADM. CODE § NR 326.04. *See* WIS. ADM. CODE § NR 326.01(1). With some exceptions which are inapplicable here, WIS. ADM. CODE § 326.04(1) provides that piers "shall not extend into the water from the shoreline beyond the

¹ The Association also contends that a permit is not required because a pier is not a "structure" under § 30.12(2), STATS. This argument is also without merit. The term "pier" is expressly defined in § 30.01(5), STATS., as "any structure" extending into navigable waters from the shore, built to provide a berth or loading area for watercraft. It is thus clearly a "structure" encompassed within § 30.12. *See Sterlingworth Condominium Ass'n v. DNR*, 205 Wis.2d 702, 716 n.5, 556 N.W.2d 791, 796 (Ct. App. 1996).

line of navigation.” The “line of navigation” is defined in WIS. ADM. CODE § NR 326.03(3) as “the 3 foot depth contour or a greater depth contour if required for boats in use or appropriate for use on the waterway, based on the normal summertime low levels on the waterway or summer minimum levels where established by department order.”

These rules constitute a reasonable application of the DNR’s authority to promulgate rules which regulate piers so as to prevent obstructions to navigation and interference with public rights in navigable waters. Moreover, based on evidence that the waterway in which the Association’s pier is located is a kettle which is connected to Lake Nagawicka by a channel two to three feet deep, the Division properly determined that boats with more than a three-foot draft were not appropriate for use in the kettle and that the three-foot depth contour applied.

Because the Division’s finding that the Association’s pier exceeded the three-foot depth contour is supported by substantial evidence in the record, it cannot be disturbed by this court. *See Sterlingworth*, 205 Wis.2d at 719, 556 N.W.2d at 797. Substantial evidence is such relevant evidence as a reasonable person might accept as adequate to support a conclusion. *See id.* An agency’s finding of fact may be disturbed only when, upon an examination of the entire record, the evidence, including the inferences therefrom, was such that a reasonable person could not have made that finding. *See id.* The weight and credibility of the evidence are for the agency, not the reviewing court, to determine. *See id.*

The record in this case indicated that a dam exists on Lake Nagawicka and that pursuant to a 1979 DNR order, the water level at the dam is to be maintained as close as possible to 98.7 feet between May 15 and October 15.

Evidence also indicated that measurements taken at the dam by the DNR on May 6, 1991, indicated that the water level was 98.71 feet. Evidence indicated that measurements were taken on the same date of the water level along the Association's pier, and that all measurements taken further than 44 feet out on the pier exceeded a depth of three feet.

This evidence was clearly sufficient to support the Division's finding that the pier had to be reduced to 44 feet to comply with the three-foot depth contour. Even if, as contended by the Association, the 1979 DNR order was not an order establishing a summer minimum level within the meaning of WIS. ADM. CODE § NR 326.03(3), testimony in the record indicted that the level discussed in the 1979 order was, in fact, the normal summertime low level. Because evidence indicated that this was also the water level when measurements were taken by the DNR on May 6, 1991, the Division could reasonably find that the pier measurements taken by the DNR on that date accurately established that the portion of the pier exceeding 44 feet in length also exceeded the three-foot depth contour.²

Because the Association's pier exceeded the three-foot depth contour, the Division properly ordered that it be reduced to 44 feet. In addition, based on the extensive evidence presented regarding potential harmful environmental effects from a pier, the Division reasonably determined that the Association was required to obtain a permit under § 30.12, STATS., for anything other than the 44-foot, single "T" pier permitted by its order.

² Contrary to the Association's argument, because the May 6, 1991 water depth was 98.71 feet and because evidence supported a finding that 98.7 feet was the normal summertime low level, it is irrelevant that measurements were not taken during the summer.

In reaching this decision, the Division found that the use of the pier had environmental consequences. While finding that the level of harm or threatened harm arising from a shortened pier did not justify a total denial of riparian access by the Association, it also found that the additional piers proposed by the Association would seriously impair the aesthetic value of the adjacent bog when viewed from the open water and would have a disruptive effect on wildlife. Based on a determination that any larger plan would likely seriously infringe the public interest, it enjoined the Association from constructing any pier other than as permitted by its order without first obtaining a permit pursuant to § 30.12, STATS.

When, as here, an agency has particular competence or expertise on an issue, we will sustain its legal conclusions if they are reasonable. *See Sterlingworth*, 205 Wis.2d at 723, 556 N.W.2d at 798. In addition, we accord special deference to the agency's decision if it is intertwined with value and policy determinations. *See id.* at 724, 556 N.W.2d at 798-99.

Evidence in the record indicated that various types of wildlife disruption might result from the increase in human and watercraft activity surrounding the pier as built and proposed by the Association. In addition, evidence indicated that sediment disruption arising from increased use of boats uproots established plant communities, causes the introduction of undesirable species, causes turbidity which impairs photosynthesis and the sight-feeding ability of some species of fish, and increases toxic substances which impair the reproduction and survival of an important fishery food source. Based on this evidence, the Division could reasonably conclude that a pier larger than the 44-foot dock permitted by it would interfere with public rights by threatening the surrounding environment. *Cf. id.* at 720-22, 556 N.W.2d at 797-98. It therefore

reasonably enjoined the Association from building a bigger pier or additional piers without obtaining a permit.

The final argument we must address is the Association's claim that the Division improperly enjoined its members from operating watercraft propellers in water depths of ten feet or less. However, based on the evidence regarding the harmful effects of sediment disruption caused by propeller use, this decision constituted a reasonable condition designed to prevent environmental damage and protect public rights and interests. The Association's claim that it violates equal protection because it does not apply to the public at large is specious since the pier is for the use of its members, not the public at large. Because the two groups are not similarly situated in reference to the pier, differing conditions related to their use of the pier are not constitutionally suspect.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

